(12)

Office - Supreme Court, U. S.
FILED
JAN 25 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No. 631

BENJAMIN E. COHEN, ET AL.,

Petitioners,

vs.

LEONARD A. YOUNG, ALICE D. COFFIN, CHARLES M. YOUNG, L. A. YOUNG SPRING & WIRE CORPORATION, AMERICAN STEEL & WIRE COMPANY OF NEW JERSEY, ISAAC C. FORCHEIMER, LUCILLE K. LEVY, MARIANNE L. FISCHER, ROSALIE B. SPERRY, AND JOSEPHINE YANKAUER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MEYER ABRAMS,
134 N. LaSalle Street,
Chicago, Illinois,
HARRIS W. WIENNER,
1177 Penobscot Building,
Detroit, Michigan,
Attorneys for Petitioners.

SHULMAN, SHULMAN AND ABRAMS,
Of Counsel.

Midwest Law Printing Co., 340 W. Huron St., Chicago

INDEX.

	PAGE
Statement of the Matter Involved	2
The Questions Presented	10
The Reason for the Allowance of the Writ	12
Prayer for Relief	15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No.

BENJAMIN E. COHEN, ET AL.,

Petitioners,

vs.

LEONARD A. YOUNG, ALICE D. COFFIN, CHARLES M. YOUNG, L. A. YOUNG SPRING & WIRE CORPORATION, AMERICAN STEEL & WIRE COMPANY OF NEW JERSEY, ISAAC C. FORCHEIMER, LUCILLE K. LEVY, MARIANNE L. FISCHER, ROSALIE B. SPERRY, AND JOSEPHINE YANKAUER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Benjamin E. Cohen, by Ruth Cohen, administratrix of his estate, and the other petitioners, the appellants below, consisting of over 100 stockholders of the L. A. Young Spring & Wire Corporation, petition for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review its judgment of April 21, 1943, made final by

denial of a rehearing on December 1, 1943, to the end that its judgment may be reversed with directions to grant the relief prayed for in Petitioners' Complaint.

STATEMENT OF THE MATTER INVOLVED.

Respondent, Isaac C. Forcheimer, a holder of 100 shares in the L. A. Young Spring & Wire Corporation, filed a Class action (R. 9)* on April 11, 1935, in the District Court at Detroit against respondents Leonard A. Young, Alice D. Coffin and Charles M. Young, principal stockholders, officers and directors of the corporation, seeking their removal and to hold them personally liable for their misconduct and for fraud perpetrated on the corporation, which was also made a defendant. By a supplemental complaint the respondent, the United States Steel Corporation and its subsidiary, were made additional defendants. Four stockholders were allowed to intervene, and they filed an intervenors' complaint seeking additional relief.

During the pendency of the cause, and while it was dormant for four years, additional frauds were committed by the defendants, which were the subject matter of a supplemental complaint filed March 7, 1939 (R. 6). Additional acts of fraud were committed leading to the filing on August 9, 1939 (R. 117) of an "amendatory supplemental complaint". This resulted in the entry of an order on September 25, 1939 (R. 170), restraining the corporation from paying to the dominant stockholder, Leonard A. Young, in excess of $50,000.00 per

* The reference "R" is to the printed report of the proceedings up to January 8, 1941, and which was filed as Exhibit 3. The reference "Tr." is to the transcript of the proceedings commencing May 18, 1942.

year as his salary, besides $24,000.00 for expenses. When the case was finally set for trial on March 29, 1940, an offer of compromise was made to settle all of the frauds, the misconduct, the debts, and the accountings and actions for $275,000.00 (R. 554). On May 8, 1940, a rule was issued (R. 515), and served on Benjamin E. Cohen, a holder of 300 shares, and on the other stockholders, to show cause on May 29, 1940, why the settlement should not be approved. None of the causes of action were stated in the notice. Benjamin E. Cohen appeared, by his counsel in response to the Rule, and filed an intervening petition (R. 518) and objections (R. 526) to the settlement. The Judge struck his intervening petition, overruled his objections, and by his order of June 29, 1940, approved the settlement (R. 530). The approval was entered on the ground that Leonard A. Young was insolvent, although no testimony was offered to prove the insolvency, and no opportunity was given to counsel for Benjamin E. Cohen to offer evidence. An appeal followed to the United States Circuit Court of Appeals for the Sixth Circuit. The Court held that in view of the admitted frauds, the Judge abused his discretion and erred in approving the settlement. It reversed the decree, and directed the Judge to pass on the merits of the settlement. It concluded the opinion with the statement that Cohen's proof was limited to the question of Young's insolvency (*Cohen* v. *Young*, 127 F. (2), 721).

Upon the filing of the mandate on May 18, 1942, and the redocketing of the case (Tr. 2), the other petitioners, consisting of over 100 stockholders, filed a motion on May 21, 1942 (Tr. 6), supported by verified petitions (Tr. 8), for leave to intervene and to file instanter an Intervenors' Complaint (Tr. 11), seeking additional relief. They also asked for leave to file instanter objec-

tions to the compromise. The Court reserved its ruling on the question of intervention, but granted leave to file the objections instanter (Tr. 34) which objections were duly filed (Tr. 20) on July 20, 1942.

At the hearing of the case on the objections to the compromise, the Court limited the issues to the question of the insolvency of Leonard A. Young under its construction of the mandate. It determined that he was insolvent, on the ground that the 112,885 shares of stock which he owned in the corporation were quoted on May 31, 1942, at $6.00 per share (Tr. 90).* There was no proof that any sales were made on that date, or that it was a normal market. The finding was made in the face of petitioners' undenied proof of the fluctuations of the market ranging from a "low" of 12½ to a "high" of 46⅝ during the year 1937, from 9⅜ to 25⅞ in 1938 and from 9½ to 21¼ during 1939. The range was shown for the years 1929 to 1941 (Tr. 83). In arriving at the conclusion that he was insolvent, the court treated as valid his conveyance to his wife of property valued in the amount of $1,621,906.58 and the liability of $2,554,429.33 which he created in her favor, in settlement for alleged antecedent debts (Tr. 89), notwithstanding the fact that he was then indebted to the corporation in the amount of $720,000.00 which he "borrowed", and he then claimed that he "was unable to meet his obligations and was at no time since that period able to pay the sum of $720,000.00" to the corporation (R. 57). The Court did not take into consideration his potential earning capacity and his actual earning of $245,261.03 in 1940, $302,493.56 in 1941, the reduction of his debts by $510,000.00, and his ability to meet all his payments as they matured.

The attorneys for the plaintiff who recommended the settlement on behalf of the Class urged the court to dis-

* Each share earned $5.94 before taxes and $3.35 "net" during the year 1941 (Tr. 422).

regard his earning capacity on the assumption that he was 70 years old (Tr. 137) while the evidence showed that he was only 65 years old (Tr. 91).

One of the grounds of Petitioners' objections, and of the relief sought in their complaint was (Tr. 18) that Young fraudulently obtained the release of valuable collateral from the corporation when he cancelled his debt of $994,417.16, and that this collateral was still worth the amount of the debt, and even if he was insolvent, the corporation was entitled to impress a lien on such collateral which was not encumbered. The petitioners also sought to have him return to the treasury the sum of $98,404.00, being the difference between the $50,000.00 which he was allowed to draw by the restraining order, and the salary of $148,404.00 that he drew during the year 1940 (Tr. 18) based on his conception that the decree of June 29, 1940, which approved the settlement operated as a dissolution of the restraining order, notwithstanding the prosecution of the appeal resulting in the reversal of the decree which left the restraining order in full force and effect.

On August 13, 1942, the District Court denied the intervention on the ground of lack of jurisdiction (Tr. 93), overruled the objections, and again approved the settlement for $275,000.00 (Tr. 94) without excluding his 112,885 shares from participation in the amount of the settlement, without protecting the stockholders from repetitions of the "borrowing", and from drawing the excessive salary, and without requiring him to refund to the estate the difference between the $50,000.00 and the $148,404.00 which he drew in 1940 when the restraining order was in full force and effect.

After the filing of the record and appellants' brief in the Court of Appeals, Petitioners moved there for the issuance of an order restraining the principal defendants from encumbering the collateral. Upon consideration of the petition and "record", the Court of Appeals issued the restraining order on February 8, 1943 (Tr. 427), and advanced the case for argument of its own motion. The case was argued on April 9, 1943, and on April 21, 1943, the Court affirmed the decree below by a *per curiam* opinion (Tr. 428). A petition for rehearing was filed on May 12, 1943 (Tr. 429) which was held under advisement until December 1, 1943, when it was denied without a further opinion (Tr. 437).

Subsequent to the denial of the rehearing said Benjamin E. Cohen died, and his wife, Ruth Cohen, was appointed as administratrix of his estate by the Probate Court of Cook County, Illinois, and she, therefore, joins in this petition in her representative capacity.

For a complete understanding of the issues involved it is necessary to state the nature of the claims which were asserted against the defendants which were substantially admitted by the pleadings to be true, and which were compromised.

The original complaint charged Young, the dominant stockholder, and his associates, the officers and directors of the corporation which he controlled, with wrongful "borrowing" of $994,417.00 from the corporation, secured by collateral notes under which 40,893 shares of the corporation and other securities were pledged (R. 11-12). The debt and the notes were fraudulently cancelled and Young received the release and return of the 40,983 shares and the other collateral without any consideration (R.

13-16, 23). This release was obtained by a proposition to the corporation which he dominated to exchange worthless stock owned by Young for the collateral notes and the collateral. The proposition was in the name of "L. M. Whitney" (R. 41-42), a fictitious name used by L. A. Young (R. 183, 232).

Young admitted that he owed a balance of $198,673.61 from a further "borrowing" on January 4, 1937, of $750,000.00 (during the pendency of the case) to pay his personal obligation to the United States Steel Corporation, whereby he obtained the release of his real estate and the real estate of his wife, Ola, which were pledged as security. The reduction of the debt to $198,673.61 was obtained by "bonuses" in the amount of $269,516.86 declared during the pendency of the case (R. 168, 239-240). Young also entered into an illegal contract with the corporation on June 28, 1938, during the pendency of the suit, and received thereunder $150,000.00 which he failed to return (R. 61, 79). This contract was assailed by the supplemental complaint. After he filed a verified answer on April 7, 1939, that the contract was "cancelled" and everything was placed in "*status quo*" (R. 98) he secretly entered into another contract where he obtained the same results, and retained the $150,000.00. This was the subject matter of the "amendatory supplemental complaint" (R. 117-118). He converted to his own use $40,780.97 (R. 168-169). He obtained "bonuses" during the pendency of the cause amounting to $713,539.66 (Tr. 45-46). He obtained "rebates" on contracts entered into with the United States Steel Corporation and its subsidiary (R. 194, 244, 257).

On September 25, 1939, the District Court issued a temporary injunction based on its "findings" that there was

"danger of irreparable loss to stockholders" if the defendant were not restrained from making any further loans to Leonard A. Young and restrained him from drawing in excess of $50,000.00 for salary (R. 170-174).

Petitioners' Proposed Complaint (Tr. 18) sought to have him refund to the estate the excess above the $50,000.00 of the salary drawn during the year 1940 in the amount of $148,404.00, after the reversal of the settlement decree which left the restraining order in force. It sought to have him return the 40,983 shares to the treasury and to restrain him and his wife from transferring or encumbering the shares. It asked that the United States Steel Corporation be held liable for obtaining $750,000.00 from the corporation in payment of the personal obligation of the president, Leonard A. Young (Tr. 19). It also sought to impress a trust and a lien on the shares which were transferred to his wife, Ola Young, and to a corporation which he controlled because of their knowledge of the facts that these shares were fraudulently removed from the treasury of the corporation (Tr. 18-20).

The District Court denied the right to file the Petitioners' Complaint on the theory that its jurisdiction was limited by the mandate of the Court of Appeals to the question of Young's "insolvency". It determined that he was "insolvent" by applying the test of to the value of the collateral by selecting an isolated day, May 31, 1942, when the stock of the corporation was quoted at $6.00 per share, without proof of any sales or of a normal market. Each share earned $5.94 for the fiscal year (Tr. 422). It held as valid the transfer from Leonard A. Young to his wife Ola Young of his assets in excess of $1,600,000.00 and the creation of a liability in her favor of over $3,500,000.00 at a time when he was indebted to the corporation in the sum of $720,000.00, which he

claimed he was not able to pay. Based upon these facts, the Court concluded that he was insolvent (Tr. 87) and approved the settlement, disregarding the conceded facts that the collateral which he removed was valued in excess of $500,000.00 on which it could have impressed a trust in favor of the corporation.

The Court of Appeals in its *per curiam* opinion held (Tr. 428) that the Judge properly construed its mandate limiting the issue to the insolvency of Young. It stated that it appeared from the record that the findings of fact are supported by "substantial evidence", and that the conclusions of law drawn therefrom by the Judge were "correct". Not a word is said in the opinion on the point urged that the evidence was clearly incompetent. In the petition for rehearing it was pointed out, among other things (Tr. 430), that the finding that the 112,885 shares were valued at $6.00 per share on May 31, 1942, was clearly erroneous because it was based on a market quotation of the isolated day, without any proof of sales or of a *bona fide* existing market and the market was closed on May 30 and May 31, 1942, because of legal holidays. To illustrate the unfairness of the test as applied by the Judge in selecting an isolated day, the petitioners called its attention that on the day of the oral argument, on April 9, 1943, the shares were quoted at 13¾, and on May 6, 1943, the date of the filing of the petition for rehearing, the stock closed at 13⅛ (Tr. 430). This Court may take judicial notice of the market quotation. On January 5 and 6, 1944, the stock was quoted at 15½. On January 15, 1944, the quotation was 15⅜. A change from the $6.00 per share to $15.50 would have changed his position from insolvency to "solvency". It does not appear from the *per curiam* opinion how the Court arrived at its conclusion that the finding of facts

are supported by "substantial evidence" and that the "conclusions of law" drawn from them are "correct" in view of the points urged that the market quotation of an isolated day was incompetent evidence and that the treatment of the conveyance by Young to his wife and the creation of the $2,500,000.00 liability as valid, at the date when he could not meet his $720,000.00 debt to the corporation, was clearly without any foundation in the law.

If the Court of Appeals would have eliminated the clearly incompetent evidence, it could not have arrived at its conclusion that the findings were supported by substantial evidence, as there would have been no evidence to support any of the findings. If the Court of Appeals had correctly applied the law concerning the admissibility of evidence, and the burden of proof which was cast upon the proponents of the settlement to establish the insolvency of Young, then it would have been compelled to conclude that the court improperly ruled on the propositions of law concerning the validity of the conveyance by Young to his wife of his major assets and the creation of a liability of $3,500,000.00 for an alleged antecedent debt at a time when he, as the dominant stockholder of the corporation, was indebted to it in the amount of $720,000.00, and which he then claimed not to have been able to pay because his fortune was swept away by the crash of the market (R. 57).

THE QUESTIONS PRESENTED.

1. Whether the filing of the complaint by the Intervenors under Rule 24, after the case was redocketed under the mandate of the Circuit Court of Appeals, was directory or permissive, and whether the denial thereof because of the alleged limit of its jurisdiction by the man-

date of the Court of Appeals was proper, notwithstanding that some of the matters alleged occurred during the pendency of the appeal, and that the notice under Rule 23 (c) did not inform the Petitioners of the nature of the causes of action which were to be compromised and their first opportunity to intervene after they discovered the facts was upon the redocketing of the case.

2. Whether the approval of the settlement under Rule 23 (c) on the theory that Young was insolvent was proper, when it appeared that he earned $245,261.03 in 1940 and $302,493.56 in 1941 and met each of his obligations at their respective maturities and reduced his principal debt by $510,000.00, and whether the acceptance of $275,000.00 in settlement of an indebtedness in excess of $1,000,000.00, of which $148,404.00 was immediately withdrawn in "salary" and the release from all frauds and malfeasance without any protective measures to avoid their repetitions, was within the meaning and intent of Rule 23.

3. Did the Court of Appeals clearly err when it approved the finding of the Judge that Young was insolvent on the ground that it was sustained by "substantial evidence" when such evidence consisted of a market quotation of an isolated day, without proof of any sales and normal market, and when no consideration was given to the actual value of the securities as reflected by the books, earnings, and other elements of value.

4. Whether the Court of Appeals clearly erred when it approved the conclusion of the Judge as to the validity of the transfer by Young to his wife of his major assets for an alleged antecedent debt and the creation of a debt in excess of $3,500,000.00 in her favor, at a time when he owed to his corporation $720,000.00 and asserted he was in

no position to meet the obligation, in reaching the conclusion of Young's insolvency as a basis for the settlement.

5. Even if it be assumed that Young was insolvent, was it proper to approve the settlement of his misconduct which the court had found endangered the rights of the shareholders when it issued the restraining order, in consideration of a payment of $275,000.00, when he drew during the same year while the first appeal was pending over $148,000.00 in "salary", notwithstanding the existence of the restraining order which prohibited him from drawing more than $50,000.00 and in the face of the undenied proof that there were assets in excess of $1,000,000.00 on which the corporation was entitled to impress a trust, to the exclusion of other creditors.

6. Whether in remanding the case for further proceedings not inconsistent with its opinion, the Court of Appeals limited the retrial to the issue of Young's insolvency, and whether this operated as a limitation on the jurisdiction of the District Court from permitting other stockholders to intervene and obtain affirmative relief for matters that occurred during the pendency of the appeal, and of which they had no prior knowledge.

7. Whether the Court of Appeals properly sustained the decree below in the absence of competent proof to support any of the material findings upon which the Court based its decree that Young was insolvent.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The *per curiam* opinion which approved the decree below holding that a market quotation of an isolated day of listed securities without proof of any sales and normal

market, and without considering the value of the securities as reflected by the books, earnings, and other elements of value constituted substantial evidence, is in conflict with decisions of other circuits.

2. The denial of the right to intervene under Rule 24, and the denial to grant the relief under the Intervenors' Complaint for alleged lack of jurisdiction upon the redocketing of the case when the former decree was reversed with directions for a hearing in conformity with the views expressed in the opinion, is in conflict with decisions of other circuits, and in order to harmonize the decisions on important federal procedure, the writ should be issued.

3. The determination that Young was insolvent when he earned $245,261.03 in 1940 and $302,493.56 in 1941, and when he met each of his obligations at their respective maturities, and reduced the principal of his debt by $510,000.00, which enabled him to obtain a settlement of a debt in excess of $1,000,000.00 for $275,000.00 and the release from all of his frauds and misconduct without preventive measures from future misconduct after he demonstrated the continuance of his misconduct when he drew $148,000.00 in 1940, notwithstanding the existence of the restraining order which limited his salary to $50,000.00, is so contrary to the settled law of the land and to public policy that such a decision should not go unchallenged, and the writ should be issued.

4. The determination that a court is without jurisdiction to permit stockholders to intervene upon the redocketing of a case which was reversed on review, when such stockholders learned for the first time of the frauds committed against them because the notice under Rule

23 (c) failed to disclose such facts to them, is contrary to the spirit of the Rule and to the conscience of a court of equity, and the writ should be issued to review such a decision.

5. The affirmance of a decree which based its finding of insolvency upon the validity of a conveyance by a husband to his wife of his major assets for an alleged antecedent debt and creating a liability to his wife in excess of $3,500,000.00 when he owed the corporation of which he was a dominant stockholder $720,000.00, is contrary to universal law and the writ should be issued in order to obtain the reversal of such a decision.

6. The Court of Appeals failed to pass upon the points urged by the petitioners in their appeal, namely, that there was no competent proof to sustain the findings, and the filing of *per curiam* opinions in such cases should not be encouraged.

7. Rule 23 (c) required a hearing on the merits of the approval of the settlement, and it was improper to limit the hearing to the question of insolvency when there were available assets in excess of $1,000,000.00 upon which the corporation could have impressed a trust. It was the duty of the Court to grant the protective measures to prevent fraud in the future management of the corporate affairs as to the dominant officers who committed their frauds under the very eyes of the court subsequent to the filing of the suit, as found by the Court if Appeals in its previous opinion (*Cohen* v. *Young*, 127 F. (2) 721-726), and the decision which enabled the dominant corporate officers to commit fraud, to compromise their frauds and misconduct, and to remain in control of the corporation without future restraint, is not in conformity with equitable principles, and the writ should be issued to review such a decision.

8. The application of Rule 23(c) to the compromise of frauds by dominant officers, directors and stockholders over the objections of a large group of stockholders whereby their frauds will be condoned and they will be enabled to repeat them without restraint in further "borrowings", "bonuses" and "salaries" as they have demonstrated in the past, is challenged by the petitioners. The Writ should be issued in order to obtain a proper construction of Rule 23 as to the duties, powers and responsibilities of the Courts in approving such settlements.

PRAYER FOR RELIEF.

Wherefore, the above petitioners, by their counsel, jointly and severally pray the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to the end that the judgment may be reversed with proper directions as to the Court may seem meet.

MEYER ABRAMS and
HARRIS W. WIENNER,
Attorneys for Petitioners.

January 15, 1944.

SHULMAN, SHULMAN AND ABRAMS,
134 North La Salle Street
Chicago, Illinois
Of Counsel.